RECENT DECISIONS.

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BAILMENTS—NEGLIGENCE OF BAILEE—BURDEN OF PROOF.—The defendant hired a horse from the plaintiff and returned it in a damaged condition. *Held,* these facts raised a presumption of negligence which put the burden of proof upon the defendant. *Davis* v. *Taylor & Son* (Neb. 1913) 139 N. W. 687.

Since the duty of a bailee is one of due care, see *Finucane* v. *Small* (1795) 1 Esp. 315, and not ordinarily an absolute one for the return of the chattel upon the termination of the bailment, *Hyland* v. *Paul* (1860) 33 Barb. 241, in a suit by a bailor the negligence of the bailee is an essential element. *Beller* v. *Schultz* (1880) 44 Mich. 529; *Ross* v. *Clark* (1858) 27 Mo. 549; but see *Cass* v. *Boston & Lowell R. R.* (Mass. 1867) 14 Allen 448. There seems, therefore, to be no reason for excepting cases of bailment from the general rule that the burden of proof of material facts is upon the plaintiff. *Carrier & Harris* v. *Dorrance* (1882) 19 S. C. 30; *cf. Abrath* v. *N. E. Ry.* (1883) L. R. 11 Q. B. D. 440. Proof, however, of a failure to return the goods bailed, or of a return of the goods in a damaged condition, would seem to give rise to an inference of fact which, in the absence of any explanation by the bailee, would justify a jury in finding the requisite negligence, *Baker & Lockwood Co.* v. *Clayton* (1907) 46 Tex. Civ. App. 384; see *Buchanan* v. *Smith* (N. Y. 1877) 10 Hun 474, and the burden of coming forward with the evidence, though not of proving by preponderance of evidence, would thus shift to the defendant. *Levi & Co.* v. *Missouri K. & T. R. R.* (1911) 157 Mo. App. 536. Where an account is given, this burden of evidence would be returned to the plaintiff, see *Logan v. Mathews* (1847) 6 Pa. 417, and so it may be shifted several times during the trial. *Cf. Powers* v. *Russell* (Mass. 1832) 13 Pick. 69. The cases, however, which like the principal case place the burden of proof of the negative proposition of freedom from negligence upon a defendant bailee, *Patriska* v. *Kronk* (1908) 109 N. Y. Supp. 1092; *Funkhouser* v. *Wagner* (1871) 62 Ill. 59, would seem to be against the better reason and to have been influenced by the untechnical use by the courts of the terms "presumption" and "burden of proof." See Thayer, Evidence, 351.

BANKRUPTCY—EFFECT ON JUDGMENT LIEN—TRUSTEE'S TITLE.—The plaintiff obtained a judgment within four months of the defendant's petition in bankruptcy, and attached property which the trustee subsequently rejected. *Held,* one judge dissenting, the lien was not destroyed. *McCarty* v. *Light* (App. Div. 1913) 139 N. Y. Supp. 853.

A trustee in bankruptcy is vested by operation of law at the date of the adjudication with the title of the bankrupt and with rights of a judgment or attaching creditor as to all properties not actually exempt, Bankruptcy Act (1898) §70a; Collier, Bankruptcy (9th ed.) 993; see 13 COLUMBIA LAW REVIEW 158; *Clarke* v. *Larremore* (1902) 188 U. S. 486, and these properties are held by him free from all liens of judgments obtained against the bankrupt while insolvent and within four months prior to the filing of the application. Bankruptcy Act (1898) § 67f; *Clarke* v. *Larremore, supra.* He has the right, however,

to reject any property that may prove onerous or unprofitable. *In re Cogley* (1901) 5 Am. Bank. Rep. 731; see *In re Dillard* (1873) 7 Fed. Cas. 703. It would seem that by such action the title would be revested in the bankrupt, who would thereby claim through the trustee free from the lien. The cases, however, treat the trustee's right, not as an option to return, but as an election not to accept the property. *Sessions* v. *Romadka* (1891) 145 U. S. 29; *Sparhawk* v. *Yerkes* (1891) 142 U. S. 1. Since, under this view, the property in question never came within the scope of the bankruptcy there is some justification for preserving the lien against the bankrupt, *Rochester Lumber Co.* v. *Locke* (1903) 72 N. H. 22; *cf. McKenney* v. *Cheney* (1903) 118 Ga. 387, and thus, despite the sweeping language of §67f, reaching a conclusion which is in complete harmony with the general principle of law that a former property owner who held subject to equities does not, upon a reconveyance from even a *bona fide* purchaser, succeed to the latter's rights. 2 Pomeroy, Equity Jurisdiction (3rd ed.) § 754.

BANKS AND BANKING—COLLECTIONS—PAYMENT BY CHECK.—In support of a plea of payment of a draft upon the defendant which the plaintiff had indorsed to a bank for collection, the defendant proved that he had given the bank a check drawn upon itself for the amount. *Held,* the draft was paid. *Schafer* v. *Olson* (N. Dak. 1913) 139 N. W. 983.

The general rule undoubtedly is that an agent for collection cannot in the absence of a special agreement or usage receive anything but current money in payment. *Pitkin* v. *Harris* (1888) 69 Mich. 133; *Ward* v. *Smith* (1868) 7 Wall. 447. Where a principal selects a bank as his agent, however, it is widely held that he contemplates payment in accordance with the general custom of banks and the commercial world. *Howard* v. *Walker* (1892) 92 Tenn. 452. While the delivery of a draft or check drawn upon another than the collecting bank would, in its hands, be no more a payment than if given to an individual. *Bank* v. *Johnson* (1896) 6 N. Dak. 180, where a check or certificate of deposit upon itself is accepted by a bank it is usually treated as payment. *Daniel* v. *Bank* (1899) 67 Ark. 223; *Scott* v. *Gilkey* (1894) 153 Ill. 168; *contra, Bank* v. *Byrne* (1893) 97 Mich. 178. This view would seem reasonable, as displacing the useless ceremony of a withdrawal and redeposit of funds. *Mortgage Co.* v. *Tibballs* (1884) 63 Ia. 468. It is sound, however, only if the bank had sufficient cash on hand to meet the check upon presentment. See *Welge* v. *Batty* (1882) 11 Ill. App. 461; *cf. Montgomery County* v. *Cochran* (1903) 126 Fed. 456. The weight of authority seems to have acted upon the presumption that a "going concern" has cash to a reasonable amount, *Board of Education* v. *Robinson* (1900) 81 Minn. 305; *Smith* v. *Mitchell* (1903) 117 Ga. 772, thus supporting the decision of the principal case. It is submitted, however, that so tenuous a presumption should not be invoked in the mere interests of the debtor's convenience, to shift the *onus* of the affirmative plea of payment. See *Lokken* v. *Miller* (1900) 9 N. Dak. 512.

CARRIERS—LIMITATION OF LIABILITY—DEVIATION.—In consideration of a reduced rate for the transportation of cattle, a shipper agreed that in case of loss the carrier should be liable for them at an agreed valuation only. A deviation was made from the stipulated route and they were injured. *Held,* two judges dissenting, the actual and not the agreed value should be the basis of recovery. *Atlantic Coast Line R. Co.* v. *Hinely-Stephens Co.* (Fla. 1913) 60 So. 749.

The doctrine of maritime law that an improper departure from the method and course of transportation agreed upon by the parties violates an implied condition of a marine insurance policy, *Beatson* v. *Haworth* (1796) 6 D. & E. 531; *Company of Merchants* v. *British Ins. Co.* (1873) L. R. 8 Exch. 154, and thus deprives the shipper of a safeguard against perils which the carrier has not assumed, has led the courts to shift the insurer's liability to the carrier wrongfully making the deviation, *Thorley* v. *Orchis S. S. Co.*, L. R. [1907] 1 K. B. 243, 660; *Balian* v. *Joly* (1890) 6 Times L. R. 345, even though it had no causal connection with the loss. *Wallace* v. *Swift* (1871) 31 U. C. Q. B. 523. It would seem, however, that the carrier may escape liability if it succeeds in the well-nigh impossible task of proving that the loss must have occurred if there had been no deviation. See *Globe Nav. Co.* v. *Russ Lumber Co.* (1908) 167 Fed. 228; *Maghee* v. *Camden R. R.* (1871) 45 N. Y. 514; *Davis* v. *Garrett* (1830) 6 Bing. 716. This extraordinary liability is imposed upon the carrier, even when the cargo is not insured, upon the theory that the performance of the implied obligation not to deviate is a condition precedent to the right of the carrier to rely upon the exemptions of the contract of affreightment, which are applicable only to the voyage as therein agreed upon by the parties. *Thorley* v. *Orchis, supra; Maghee* v. *Camden R. R., supra.* Accordingly, any special contract for the benefit of a carrier, limiting its liability, is rendered nugatory by a deviation, and the subsequent injury to the goods constitutes an independent tort, the recovery for which is not governed by the terms of the contract, *Waltham Mfg. Co.* v. *New York & Texas S. S. Co.* (1910) 204 Mass. 253; G. H. & *H. Ry.* v. *Allison* (1883) 59 Tex. 193, even though one of these terms is an agreed valuation. *Balian* v. *Joly, supra.*

CONSTITUTIONAL LAW—PRACTICE IN THE FEDERAL COURTS.—MOTION NON OBSTANTE VEREDICTO.—The plaintiff upon trial did not produce enough evidence to warrant a verdict, which was rendered, however, in her favor. The defendant thereupon moved to enter judgment *non obstante veredicto,* according to a statute of Pennsylvania. This motion was refused by the trial court and the evidence was spread upon the record. The Circuit Court of Appeals reversed the decision of the trial court, set aside the verdict, and entered judgment for the defendant. *Held,* a new trial should have been granted. *Slocum* v. *N. Y. Life Ins. Co.* (U. S. Sup. Ct., April 21, 1913). Not yet reported.

The common law motion *non obstante veredicto* was granted only when the defendant had pleaded in confession and avoidance and had failed to state a sufficient defense. In such a case judgment could be given on the pleadings after the verdict had been entered for the opposing party. *Bellows* v. *Shannon* (N. Y. 1841) 2 Hill 86. The motion in the principal case, however, not being based upon the pleadings, seems to bear more analogy to the old common law demurrer to the evidence. This motion compelled a joinder if the demurrant admitted all the facts attempted to be proven by his adversary, and was upheld when such proof would be clearly insufficient to sustain a verdict. See *Gibson* v. *Hunter* (1793) 2 H. Bl. 187; *Wright* v. *Pindar* (1647) Aleyn 18. Since there is no precedent indicating that this demurrer was ever attempted at common law after the facts had been examined by the jury, the decision in the principal case is sound, under a strict interpretation of the constitutional guaranty that "no fact tried by a jury shall be otherwise re-examined in any court of the United States

than according to the rules of the common law." But as the question of sufficiency of fact to sustain a verdict is a question of law, where the facts were admitted and spread upon the record the motion might very well have been allowed even after verdict, since the Seventh Amendment applies only to matters of substance and not to mere details of form. The decision, certainly, is to be regretted in the face of the present movement for fewer trials and less expensive litigation.

CONSTITUTIONAL LAW—RETROSPECTIVE LEGISLATION BY A STATE—VESTED RIGHTS.—A statute of Washington authorized the City of Tacoma to grade its streets, and provided that it should compensate abutting property owners for consequential damages. After the grading, and pending the plaintiff's action, the statute was repealed. *Held,* the plaintiff's right of action was a vested property right that could not be revoked by the repeal of the statute. *Ettor* v. *City of Tacoma* (U. S. Sup. Ct., April 7, 1913). Not yet reported. See Notes, p. 534.

CONTRACTS—EXECUTION OF A NOTE ON SUNDAY—RATIFICATION.—The plaintiff sued on three promissory notes executed on Sunday as payment of a premium on an insurance policy. *Held,* the notes, though void when made, were ratified by the defendant's retention of the policy. *Planters' Fire Ins. Co.* v. *Ford* (Ark. 1913) 153 S. W. 810.

At common law any contract made on Sunday was held to be valid until Statute 29 Car. 2, which provided that contracts made on that day along the line of an individual's ordinary calling should be void. *Drury* v. *DeFontaine* (1808) 1 Taunt. 131; *O'Rourke v. O'Rourke* (1880) 43 Mich. 58. In this country also, many jurisdictions provide by statute that a contract or instrument completely executed on Sunday is void. 1 Daniel, Negotiable Instruments (5th ed.) § 69. Whether or not such contracts can be ratified so as to become enforcible, is a question over which the courts differ. The weight of authority seems to be that a contract so made may be subsequently ratified on a secular day, arguing that since the consideration itself is neither immoral nor illegal there is nothing in public policy to prohibit its ratification. *Tucker* v. *West* (1874) 29 Ark. 386; see *Adams* v. *Gay* (1847) 19 Vt. 358; *contra, Day* v. *McAllister* (1860) 81 Mass. 433. Again, it is held that since it is not the intention of the law that its regard for the Sabbath be made a means of perpetrating a fraud, *Cook* v. *Forker* (1899) 193 Pa. 461, an act of ratification will estop the party from denying the original validity of the contract. *Russell & Co.* v. *Murdock* (1890) 79 Ia. 101. But the strictly logical view would seem to be that since the contract was illegal at the time of its inception there was nothing upon which the ratification could operate. *Pope* v. *Linn* (1863) 50 Me. 83; *Reeves* v. *Butcher* (1865) 31 N. J. L. 225; *cf. Hayward* v. *Barker* (1880) 52 Vt. 429. A recovery, according to this view, could be had only on the ground that the consideration given for the tainted contract was sufficient to form the foundation for a new promise, which, by the weight of authority, however, must be express. *Tucker* v. *West, supra;* see *Reeves* v. *Butcher, supra.*

CORPORATIONS—PREFERRED STOCKHOLDERS DISTINGUISHED FROM CREDITORS.—The petitioners held certain so-called preferred stock, which, by its terms, had no voting power. It was to be redeemed before a fixed date at 110% of par, was to receive that sum and no more in case of prior dissolution, and was to draw 10% cumulative dividends out of

the earnings. All these terms were secured by a mortgage. Upon the bankruptcy of the corporation, *held,* the mortgage lien was void as against creditors. *Spencer* v. *Smith* (C. C. A. 8th Cir. 1912) 201 Fed. 647.

If it be conceded that the petitioners in the principal case were really preferred stockholders, both the mortgage, *Guaranty Trust Co.* v. *Galveston City R. Co.* (1901) 107 Fed. 311, and the agreement to redeem, *Ellsworth* v. *Lyons* (1910) 181 Fed. 55, would be held inoperative as against creditors, on the theory that it would work a fraud upon them to permit the same party to have the advantages both of a stockholder and of a creditor. The fundamental question, therefore, is whether the petitioners are stockholders or creditors of the corporation; for the mere use of the term "stock" is not conclusive of the legal effect of the certificate. *Cooke* v. *Equitable etc. Assn.* (1898) 104 Ga. 814, 828; *Heller v. Marine Bank* (1899) 89 Md. 602; but see *Miller* v. *Ratterman* (1890) 47 Oh. St. 141, 156. The most distinctive characteristics of the relation of stockholders are the rights of participating in the management, and of sharing in the profits and losses of the corporation. See *Burt* v. *Rattle* (1876) 31 Oh. St. 116. The fact that neither of these features exists in the principal case would seem to indicate a clear intention to make the petitioners creditors rather than stockholders; see *Savannah etc. Co.* v. *Silverberg* (1899) 108 Ga. 281; and the mortgage held by them, inasmuch as it would be practically nugatory if they are to be deemed stockholders, further supports this conclusion. *Burt* v. *Rattle, supra;* but see *Miller* v. *Ratterman, supra,* p. 159.

CORPORATIONS—REORGANIZATION—INTEREST OF STOCKHOLDERS—EFFECT OF FORECLOSURE ON CREDITORS' RIGHTS.—Pursuant to a plan for reorganization, the property of a railroad was sold under foreclosure proceedings to a new company, in which stock was given to the shareholders in the old company. The plaintiff sued the new company on a debt of the old company. *Held,* four justices dissenting, he could recover. *Northern Pacific Ry.* v. *Boyd* (U. S. Sup. Ct., April 28, 1913). Not yet reported.

Because of the large amount of capital invested, railroad properties on foreclosure sale generally realize less than the mortgage debt; 3 Cook, Corporations (6th ed.) § 886; for this reason it is often held that the interest given to the old stockholders under reorganization agreements arises at the expense of the bondholders, and that unless the general creditors are prejudiced thereby they cannot object to such a sale. *Paton* v. *Northern Pac. Co.* (1896) 85 Fed. 838. It seems, however, that the interest is conceded to the stockholders to secure a waiver of their objections, and therefore is given really at the expense of the general creditors. *Louisville Trust Co.* v. *Louisville Ry.* (1897) 174 U. S. 674. This being true, it seems obvious that any interest accruing to stockholders is subject to the claims of creditors. *Railroad* v. *Howard* (1868) 7 Wall. 392. But when, as in the principal case, there is no actual fraud in fact, *Boyd* v. *Northern Pac. Ry.* (1909) 170 Fed. 779; (1910) 177 Fed. 804, it seems on principle that only that interest should be subject to the claims of creditors. *Ferguson* v. *Ann Arbor R. R.* (N. Y. 1897) 17 App. Div. 336; *Railroad* v. *Howard, supra.* Although the broad doctrine of the principle case had been previously announced by the Supreme Court, *Louisville Trust Co.* v. *Louisville R. R., supra,* it may be noted that its precepts were not followed by the lower court in the same case. *Farmers' L. & T. Co.* v. *Louisville Ry.*

(1900) 103 Fed. 110. Although stockholders are thus debarred from participation in reorganization agreements, there is nothing to prevent them from coming into the new company after the sale is consummated. *Stewart's Appeal* (1872) 72 Pa. 291.

CRIMINAL LAW—CHANGE OF VENUE ON MOTION OF THE PROSECUTOR.—The accused sought to compel the vacation of an order which changed the venue of his trial on the motion of the state. *Held,* three judges dissenting, the order should be vacated: two judges deciding that the proof by the state was insufficient, and two that the act permitting a change of venue on the application of the people was unconstitutional. *Glinnan* v. *Phelan* (Mich. 1913) 140 N. W. 87.

Most of the state constitutions guarantee to the criminal a speedy and public trial in the county or district in which the crime was committed, and consequently any legislative enactment providing for a change of venue without his consent has generally been declared unconstitutional. *In re Nelson* (1902) 19 S. Dak. 214; *Wheeler* v. *State* (1869) 24 Wis. 52; *State* v. *Denton* (Tenn. 1869) 6 Cold. 539; but see *State* v. *Durflinger* (1905) 73 Oh. St. 154; *Hewitt* v. *State* (1901) 43 Fla. 194. The accused, however, may waive his constitutional right. *Perteet* v. *People* (1873) 70 Ill. 171; see *State* v. *Kindig* (1895) 55 Kan. 113. On the other hand, the constitutions of some states, like that of the principal case, insure to the accused only a trial by jury. Such a guaranty has usually been deemed to secure to the defendant his common law right to a trial by a jury of the vicinage, 4 Bl. Comm. 350; *People* v. *Powell* (1891) 87 Cal. 348, although a statute providing for a change of venue on the application of the prosecutor is considered constitutional. *People* v. *Fuhrmann* (1895) 103 Mich. 593; *People* v. *Baker* (N. Y. 1856) 3 Park 181; *Gregory* v. *State* (Tex. 1896) 37 S. W. 752; *contra, People* v. *Powell, supra.* A change of venue, under the circumstances of the principal case, since it of necessity places the accused at a great disadvantage in obtaining his witnesses, and deprives him of the benefit of his good reputation in the community, see *People* v. *Baker, supra,* should, it seems, only be granted when an impartial trial could not possibly be obtained and a refusal to remove the case would result in a failure of justice. See *State* v. *Miller* (1870) 15 Minn. 344; *People* v. *Webb* (N. Y. 1841) 1 Hill 179.

CRIMINAL LAW—DEFENSES—ENTRAPMENT.—A statute made it felonious to sell intoxicating liquor to an Indian, irrespective of *mens rea.* An Indian who looked like a white man was sent to the defendant by the government as a decoy, and obtained a sale. *Held,* the conviction should be set aside. *U. S.* v. *Healy* (D. C. D. Mont. 1913) 202 Fed. 349.

Where entrapment deprives a crime of an essential element, such as absence of consent in crimes against property, it will, of course, prevent a conviction. *State* v. *Geze* (1853) 8 La. Ann. 52; *Speiden* v. *State* (1877) 3 Tex. App. 156; see *State* v. *West* (1900) 157 Mo. 309. Similarly, where some essential part of the crime is committed, not by the defendant, but by the decoy, the acts of the latter will not be imputable to the former to complete the offense. *People* v. *Collins* (1878) 53 Cal. 185; *Love* v. *People* (1896) 160 Ill. 501; but see *Commonwealth* v. *Seybert* (1887) 4 Pa. Co. Ct. Rep. 152. The principal case, however, seems to fall rather within the rule that when the detective merely inquires as to a course of criminal business, or creates

an opportunity for the commission of a crime, this affords no defense. *Ackley* v. *United States* (1912) 200 Fed. 217; *People v. Krivitzky* (1901) 168 N. Y. 182; see *State* v. *Abley* (1899) 109 Ia. 61. Public policy rather than principle, however, has led many courts to the view that where the original conception of the crime had its origin in the mind of the detective, a conviction should not be sustained. 1 Wharton, Criminal Law (11th ed.) 232; see *Love* v. *People, supra; Dalton* v. *State* (1901) 113 Ga. 1037; *contra, State* v. *Abley, supra;* see *People* v. *Liphardt* (1895) 105 Mich. 80. Although there is as little logical foundation for the decision in the principal case, considerations of justice lead even more strongly to the conclusion that a man should not be convicted for a crime merely *malum prohibitum* into which he was deceived by the government.

CRIMINAL LAW—DOUBLE JEOPARDY—SUIT BY STATE TO RECOVER PENALTY.—By a statute of Oklahoma the leasing of premises in violation of the liquor laws was made punishable by fine and imprisonment, and by a penalty recoverable at the suit of the state. In such a suit the defendant pleaded that the statute was violative of the provision of the state constitution against double jeopardy. *Held,* the statute was constitutional. *Stout* v. *State ex rel. Caldwell* (Okla. 1913) 130 Pac. 553. See Notes, p. 529.

DAMAGES—WARRANTY DEED.—The defendant sold land to a land company and conveyed by warranty deed to the plaintiff, the vendee of the company. *Held,* one judge dissenting, the plaintiff, failing to get a good title, could recover only the price paid to the defendant by the company. *Hunt* v. *Hay* (1913) 49 N. Y. L. J. No. 12.

Although a warranty, such as that in the principal case, runs with the land, *Geiszler* v. *DeGraaf* (1901) 166 N. Y. 339; see *Mitchell* v. *Warner* (1825) 5 Conn. 497, and therefore cannot be considered to have been broken as soon as made, the measure of damages allowed for its breach is restricted, as between the grantor and grantee, to the amount of the consideration which passed between them. *Devine* v. *Lewis* (1887) 38 Minn. 24; *Wright* v. *Nipple* (1883) 92 Ind. 310. So, in a suit by a remote grantee, the measure of damages is the amount paid the defendant by his immediate grantee, irrespective of what the plaintiff may have paid, *Cook* v. *Curtis* (1888) 68 Mich. 611; *Brooks* v. *Black* (1890) 68 Miss. 161, although some courts hold it to be the amount paid by the plaintiff, not exceeding the amount received by the defendant from his immediate grantee. *Taylor* v. *Wallace* (1894) 20 Colo. 211; *Martin* v. *Gordon* (1858) 24 Ga. 533. Where, however, as in the principal case, the defendant has received his consideration from a third person, and has then conveyed by warranty deed to the plaintiff, so that the consideration paid by the plaintiff is not necessarily the same as that received by the defendant, the courts quite unanimously choose the latter as the measure of damages. *Bowne* v. *Wolcott* (1891) 1 N. Dak. 497; *Cook* v. *Curtis, supra; Brooks* v. *Black, supra.* There is authority for the proposition that in such a case the defendant is estopped to deny that he received the consideration stated in the deed, *Graham* v. *Leslie* (1850) 4 Up. Can. C. P. 176, but the weight of authority is against such estoppel. *Gavin* v. *Buckles* (1873) 41 Ind. 528; see *Cook* v. *Curtis, supra.* In thus looking to the amount received by the covenantor, rather than to the loss suffered or even the consideration paid by the covenantee, the courts, it is submitted, have adopted an anomalous measure of damages for a breach of contract.

DOWER—FRAUDULENT CONVEYANCES—CONVEYANCE BY HUSBAND BEFORE MARRIAGE.—In order to defeat the claims of creditors and the dower right of his first wife, the husband took title of land for which he furnished consideration, in the name of trustees for his benefit. At his death, his second wife sued for dower. *Held,* she was not entitled to dower, but the land was given to her because she had held adversely for the prescriptive period. *Johnson* v. *Johnson* (Ark. 1912) 152 S. W. 1017. See Notes, p. 536.

EQUITY—LOCAL OPTION ELECTIONS—JURISDICTION TO RELIEVE FROM FRAUDULENT ELECTION.—At a local option election the officials fraudulently conspired to admit certain illegal votes and to exclude certain legal votes, thereby changing the result of the election. The suit was brought by a tax-payer for himself and others similarly situated to enjoin the town authorities from issuing licenses for the sale of liquor. *Held,* the court of equity had jurisdiction to purge the election, and to enjoin the issue of license certificates. *Patterson* v. *People ex rel. Parr* (Colo. 1913) 130 Pac. 618. See Notes, p. 526.

EXECUTORS AND ADMINISTRATORS—SALE—PURCHASE BY EXECUTOR.—The defendant, the executor of an estate and a devisee of a life interest in a portion of it, purchased the entire estate at the executor's sale. *Held,* he took only as trustee for the other devisees. *Conrad* v. *Conrad* (Ky. 1913) 153 S. W. 740.

It is a universally recognized principle in equity that an executor can not become the purchaser at his own sale of the decedent's estate, *Froneberger* v. *Lewis* (1878) 79 N. C. 426; *Jenkins* v. *Hammerschlag* (N. Y. 1899) 38 App. Div. 209, since the transaction creates a conflict between his self-interest as purchaser, and his duty to the heirs to procure the highest price possible for the property. *Michaud* v. *Girod* (1846) 4 How. 503; *Linsley* v. *Strang* (1910) 149 Ia. 690; *cf. Dyer* v. *Shurtleff* (1873) 112 Mass. 165. Where, however, the sale is conducted by one over whom the executor has no control, or, in the case of a trustee, where the trust has expired, there is no objection to his becoming a purchaser. *Dexter* v. *Harris* (U. S. C. C. 1822) 2 Mason 531; *Clark* v. *Denton* (1883) 36 N. J. Eq. 419; *Watson* v. *Sherman* (1876) 84 Ill. 263; *Dry Goods Co.* v. *Gideon* (1899) 80 Mo. App. 609. Some authorities, in opposition to the principal case, hold that though ordinarily an executor may not be a purchaser, yet if he has an interest in the property he may buy to protect himself. *Cottingham* v. *Moore* (1900) 128 Ala. 209. It would seem, however, that inasmuch as in the majority of instances the executor is an heir or a devisee, the application of this exception would practically destroy the general rule. The more satisfactory procedure for the executor, under such circumstances, is to petition the court by a bill, joining all parties interested, for permission to bid at the sale, or for the appointment of a trustee for its conduct. *Scholle* v. *Scholle* (1886) 101 N. Y. 167; see *Armor* v. *Cochrane* (1870) 66 Pa. 308; but see *Linsley* v. *Strang, supra.* This point was not raised in the principal case, but under such circumstances the court would probably have upheld the purchase. See *Faucett* v. *Faucett* (Ky. 1866) 1 Bush 511.

HIGHWAYS—ESTABLISHMENT BY USER.—Under a statute providing that lands used as a highway for twenty years should constitute a public highway, the plaintiff sought to enjoin the obstruction of a roadway

over the defendant's land. *Held,* the statute was satisfied by a user either adverse, or, if permissive, accompanied by the making of repairs by the public. *Village of Wellsville* v. *Hallock* (Sup. Ct. 1913) 139 N. Y. Supp. 961.

Although there is considerable conflict as to the basis of the public's right to prescribe for a highway, see 5 COLUMBIA LAW REVIEW 608, and as to the conclusiveness of the presumption arising from adverse user, in the face of circumstances showing that the owner had no *animus dedicandi,* see *Onstott* v. *Murray* (1867) 22 Iowa 457, it has been generally recognized in the United States that a highway may be created by twenty years' adverse user by the public as a highway. See *Pittsburg C. C. & St. L. Ry.* v. *Crown Point* (1898) 150 Ind. 536; *Hanson* v. *Taylor* (1869) 23 Wis. 547. As to what will constitute the necessary adverse user the law is not settled. Although any use by the public would seem to be presumptively adverse, *Toof* v. *Decatur* (1885) 19 Ill. App. 204, some courts require that it must be under a claim of right by the public authorities. *Stickley* v. *Sodus* (1902) 131 Mich. 510; but see *Downend* v. *Kansas City* (1900) 156 Mo. 60. Statutes similar to that in the principal case have been held to create a new right in the public in the form of a new way of obtaining a highway, but although they may have changed the right in some jurisdictions by making conclusive the presumption arising from the user, see *Strong* v. *McKeever* (1885) 102 Ind. 578, or by fixing a new period, *Bolger* v. *Foss* (1884) 65 Cal. 250, in general they are not considered as changing the nature of the required use. See *Pittsburg C. C. & St. L. Ry.* v. *Crown Point, supra.* It would seem, therefore, that the use must still be adverse, and that repair by the authorities, though relevant in the issue of acceptance of a real dedication, *State* v. *Commissioners* (1896) 83 Md. 377, cannot make adverse a use which is really by license. See *Madison* v. *Gallagher* (1895) 159 Ill. 105; but see *Speir* v. *New Utrecht* (1890) 121 N. Y. 420.

HUSBAND AND WIFE — DOWER — EQUITABLE ESTATES.—The plaintiff claimed dower in lands which her husband had contracted to purchase. Before paying all the purchase money he died and the land was thereafter conveyed to his heirs, who completed the payments. *Held,* the plaintiff was not entitled to dower. *Moran* v. *Catlett* (Neb. 1913) 139 N. W. 1041.

At common law a widow had no dower in an equitable estate. *Godwin v. Winsmore* (1742) 2 Atk. 525. This rule was changed in England by Statute 3 & 4 Will. 4 c. 105, see *Smith* v. *Spencer* (1856) 2 Jur. [N. S.] Pt. 1, 778, and in this country generally equitable dower is allowed either by statute or as a result of judicial decision. See *Reed* v. *Whitney* (Mass. 1856) 7 Gray 533; *contra, Farnum* v. *Loomis* (1861) 2 Ore. 29. The courts are in some confusion, however, in determining at what stage the vendee under an executory contract for the sale of land acquires an equitable estate in which his wife may claim dower. By one line of cases, if the vendee dies before the contract price is paid, his wife is refused dower on the ground that her husband had but an imperfect equity at the time of his death. *Crabb* v. *Pratt* (1849) 15 Ala. 843; *Walters* v. *Walters* (1890) 132 Ill. 467, 481. This view seems unsound on principle, for the vendee has a perfect equitable estate in the land as soon as he enters into a contract for it, which may be specifically enforced. See 2 Story, Equity (13th

ed.) § 790. The fact that he dies before paying the full purchase price does not bar the right to specific performance and accordingly should not bar the widow of her dower, *Thompson* v. *Thompson* (N. C. 1854) 1 Jones L. 430; *James* v. *Upton* (1898) 96 Va. 296; *Hart* v. *Logan* (1871) 49 Mo. 47, especially when the amount due is fully paid after the vendee's death. See *Greenbaum* v. *Austrian* (1873) 70 Ill. 591. The soundness of this view is recognized by the Nebraska courts, which are, however, unwillingly committed to the rule of property announced in the principal case. See *Grandjean* v. *Beyl* (1907) 78 Neb. 349.

INTERSTATE COMMERCE—STATE TAXATION—DETOUR THROUGH ADJOINING STATE.—An ordinance of the city of Leavenworth taxed the business of express companies between that city and other points in Kansas, specifically exempting interstate commerce. The defendant company's only lines of communication between Leavenworth and other Kansas points lay in part through another state. *Held,* the defendant's business was subject to the tax. *Ewing* v. *City of Leavenworth* (1913) 33 Sup. Ct. Rep. 157.

Shipments that crossed the state line but had their termini in the same state were uniformly held to constitute interstate commerce by the earlier decisions. *Lord* v. *Steamship Co.* (1880) 102 U. S. 541; *New Orleans Exchange* v. *Cincinnati R. R.* (1888) 2 Inter. Com. Rep. 375; see *Fargo* v. *Michigan* (1886) 121 U. S. 230, 247; *Covington Bridge Co.* v. *Kentucky* (1893) 154 U. S. 204, 218. In the case of *Lehigh Valley Ry.* v. *Pennsylvania* (1891) 145 U. S. 192, however, a state tax on the gross receipts from similar shipments, determined by the proportion of the transportation within the state, was upheld on the theory that it was not in fact commerce between the states. A later case, *Hanley* v. *Kansas Ry. Co.* (1903) 187 U. S. 617, held that state rates for such shipments were an interference with interstate commerce, attempting to distinguish the *Lehigh* case on the ground that though a shipment must be regarded as a unit for the purposes of rate making, *Wabash Ry.* v. *Illinois* (1886) 118 U. S. 557, it may be divided up for the purposes of taxation. *Maine* v. *Grand Trunk Ry.* (1891) 142 U. S. 217; but see *Galveston Ry.* v. *Texas* (1908) 210 U. S. 217; 8 COLUMBIA LAW REVIEW 665. But the more recent cases which support state taxes apparently levied on the franchises or gross receipts of interstate carriers do so only when the tax can be construed as a property tax, and refuse to uphold it as a tax on the business, which they recognize as interstate, see *Postal Tel. Co.* v. *Adams* (1895) 155 U. S. 688; *U. S. Express Co.* v. *Minnesota* (1912) 223 U. S. 335; 7 COLUMBIA LAW REVIEW 529, thus substantially overruling the *Lehigh* case. It would seem, therefore, that the defendant in the principal case should have come within the exemption. See *United States* v. *Delaware L. & W. R. Co.* (1907) 152 Fed. 269.

MANDAMUS—DEFENSES—UNCONSTITUTIONALITY OF STATUTE.—In a mandamus proceeding to compel the State Auditor to issue a warrant for the payment of a legislative appropriation, the respondent alleged that the act of the legislature was unconstitutional. *Held,* that such a defense could be set up. *Woodall* v. *Darst* (W. Va. 1912) 77 S. E. 264.

Every law is presumed to be valid until its unconstitutionality is judicially established. Willoughby, Constitutional Law, §§ 9, 10. It may well be argued, therefore, that this presumptional validity imposes

upon administrative officers the duty of enforcing laws even though they are in fact unconstitutional; High, Extraordinary Remedies (3rd ed.) § 143; *Smyth* v. *Titcomb* (1850) 31 Me. 272; *People* v. *Salomon* (1870) 54 Ill. 39; for to allow every official to refuse to act under a law because he conceives it to be unconstitutional would create an intolerable confusion in administration. *State* v. *Heard* (1895) 47 La. Ann. 1679; see *Thoreson* v. *State Board of Examiners* (1899) 19 Utah 18. Since, on the other hand, it is elementary that an unconstitutional law is void from the beginning, it not only imposes no duty of enforcement, but those executing it render themselves personally liable to persons injured. *Virginia Coupon Cases* (1884) 114 U. S. 270. *A fortiori*, therefore, public officers should not be compelled to administer it. *McCurdy* v. *Tappan* (1872) 29 Wis. 664; *Denman* v. *Broderick* (1896) 111 Cal. 96. To escape this dilemma the courts have attempted a distinction between mere ministerial officers and those vested with discretionary powers, *Pell* v. *Newark* (1878) 40 N. J. L. 71; *Commonwealth* v. *Mathues* (1904) 210 Pa. 372, but recent cases have advanced a more satisfactory criterion which justifies the decision in the principal case. If enforcement of the act in question would subject the officer to personal liability or would violate his oath of office, he may raise the question of its unconstitutionality; but if his duties are so subordinate that these results would not follow, administrative efficiency demands his unquestioning obedience. *State* v. *Candland* (1909) 36 Utah 406; *Denman* v. *Broderick, supra;* see *State* v. *Cease* (1911) 28 Okla. 271.

MECHANICS' LIENS—IMPROVEMENTS SWEPT AWAY BY FLOOD.—A partially erected dam was swept away by flood. The laborers and materialmen thereupon filed liens on the real estate. *Held,* the liens were valid. *Chamberlain* v. *City of Lewiston et al.* (Idaho 1912) 129 Pac. 1069.

It has been held that the mechanic's lien does not attach until notice is filed, and that therefore if the product of the labor is destroyed before the recording there is nothing to which the lien can attach, since it is primarily levied on the structure; *Kern* v. *San Francisco Co.* (Cal. 1912) 124 Pac. 862; *Schukraft* v. *Ruck* (N. Y. 1875) 6 Daly 1; and even if the destruction occurred after filing it is plausibly argued that the edifice was the principal and the land simply an appurtenance. See *Humbolt Co.* v. *Crisp* (1905) 146 Cal. 686; *Linden Co.* v. *Manufacturing Co.* (1893) 158 Pa. 238. Demolition of the structure, however, cannot affect the continuance of the workingman's right in those states where the lien takes effect either by the commencement of the work, *Halsey* v. *Waukesha Springs Co.* (1905) 125 Wis. 311, overruling *Goodman* v. *Baerlocker* (1894) 88 Wis. 287; see *McLaughlin* v. *Green* (1873) 48 Miss. 175, or by relation back from the filing. *Smith* v. *Newbaur* (1895) 144 Ind. 95. An equity thus established should not be annihilated without fault of the party for whose benefit the statute has created it. *Bratton* v. *Ralph* (1895) 14 Ind. App. 153; see *Clark & Co.* v. *Parker* (1882) 58 Ia. 509; *contra, Humbolt Co.* v. *Crisp, supra; Wighton & Brooks' Appeal* (1857) 28 Pa. 161. It has been suggested that the principal contractor, if the contract be an entire one, must have fully performed in order that the sub-contractor's lien may survive the destruction of the building, *Shine's Executrix* v. *Heimburger* (1894) 60 Mo. App. 174, but even a strict construction of the statute affords no ground for the invocation of such a condition precedent.

MORTGAGES—RECORDING ACTS—PARTIES PROTECTED.—Ten days before the bankruptcy of the mortgagor the mortagee had her mortgage recorded. The creditors objected to the allowance of this lien. *Held,* the mortgage was not a preference, and neither the trustee nor crditors generally could defeat it. *In re Watson* (D. C. E. D. Ky. 1912) 201 Fed. 962. See Notes, p. 539.

MORTGAGES—RIGHT TO POSSESSION—TENANTS.—A mortgagor leased the mortgaged premises to the defendant. The mortagee foreclosed, but the defendant was not made a party. Later the purchaser at the foreclosure sale sought a writ of assistance to recover possession of the premises from the lessee. *Held,* one judge dissenting, he was not entitled to the writ. *Dundee Naval Stores Co.* v. *McDowell* (Fla. 1913) 61 So. 108.

At common law a mortgagee, as owner of the land, might eject the mortgagor or his tenant claiming under a lease made subsequent to the mortgage. *Keech* v. *Hall* (1778) 1 Doug. 21; *Doe* v. *Bucknell* (1838) 8 Car. & P. 566. Now, however, the mortgagor is usually given the right to possession until foreclosure, either by special statute, or by an application of the lien theory of mortgages, or by a stipulation in the contract. Since a foreclosure is usually necessary, then, to entitle the mortgagee to possession, it is essential that all who possess any interest in the land should be made parties to the proceedings. 2 Jones, Mortgages (6th ed.) §§ 1395, 1396. It is generally held, however, that a tenant has no interest in the land, but merely holds under his lessor, who retains the seisin. 2 Bl. Comm.* 144; *McDermott* v. *Burke* (1860) 16 Cal. 580. Hence, the tenant's rights are *ipso facto* destroyed by the termination of his landlord's estate, and it is not necessary that he should be made a party. *Tyler* v. *Hamilton* (1894) 62 Fed. 187; *Jones* v. *Thomas* (Ind. 1847) 8 Blackf. 428. The opposite result, which has been reached in a few jurisdictions, *Lockhart* v. *Ward* (1876) 45 Tex. 227; *Averill* v. *Taylor* (1853) 8 N. Y. 44, can logically be maintained only by regarding a tenancy as an interest in the land. In New York, at least, this deviation from common law principles has received legislative sanction, New York Real Prop. Law § 30; see *Averill* v. *Taylor, supra,* and the disappearance of the early differences in the creation of freehold and leasehold interests, as well as the comparative value which the latter may possess, would seem to warrant classification of a tenancy as an estate. Moreover, even in those states where a tenant's right to possession may be ended by a foreclosure to which he was not made a party, equity sometimes refuses the aid of a writ of assistance to the mortgagee, holding that the writ may only be used against parties to the decree which it purports to enforce. See *Downard* v. *Groff* (1875) 40 Ia. 597; *Richardson* v. *Hadsall* (1883) 106 Ill. 476. A broader view of the functions of the writ seems preferable, and if it appears that the tenant's only claim is under his lessor, equity may well compel him by writ of assistance to surrender possession to the mortgagee. *Strong* v. *Smith* (1905) 68 N. J. Eq. 686.

PARENT AND CHILD—FOREIGN CUSTODY DECREE—CONCLUSIVENESS.—To habeas corpus proceedings brought by the plaintiff in Montana to obtain from her former husband the possession of her children, who had been awarded to her by a Nebraska decree, the defendant interposed the same defense which had been deemed insufficient in the former pro-

ceeding. *Held,* he was concluded by the decree. *State ex rel. Nipp* v. *District Court* (Mont. 1912) 128 Pac. 590.

While a domestic decree awarding to a parent the custody of children is, from its nature, always subject to modification, it is undoubtedly *res judicata* as between the parties until a subsequent change of circumstances can be shown. 2 Bishop, Marriage, Divorce & Separation §§ 1187, 1188. Under the full faith and credit clause of the Constitution it is generally held that a foreign custody decree, as well as the kindred decrees of divorce and alimony, *Arrington* v. *Arrington* (1900) 127 N. C. 190, is entitled to the same effect, if rendered in all respects *coram judice. Wilson* v. *Elliott* (1903) 96 Tex. 472; *Hardin* v. *Hardin* (1907) 168 Ind. 352. There is some contrary authority, however, holding that since the welfare of the child is always the paramount consideration in determining its disposition, the merits of the decree may be re-examined without proof of changed circumstances, regardless of the constitutional provision. *In re Bort* (1881) 25 Kan. 308; see *People ex rel. Hickey* v. *Hickey* (1899) 86 Ill. App. 20. But since the welfare of the child is everywhere regarded as conclusive, 2 Bishop, Marriage, Divorce & Separation, § 1161, and therefore must have been adjudicated in the original action, this view seems an unjustifiable violation of the rule against the collateral attack of foreign judgments, and was properly repudiated in the principal case.

PARTITION—ESTOPPEL—AFTER-ACQUIRED TITLE PARAMOUNT.—In an action to try title, the plaintiff claimed as alienee of a party to a partition action. The defendant, an heir of another party to the partition, had subsequently acquired a paramount title to the parcel allotted to the plaintiff's grantor. *Held,* the defendant was not estopped to set up his after-acquired paramount title. *Weston* v. *John L. Roper Lumber Co.* (N. C. 1913) 77 S. E. 430.

A common law partition, which could be compelled only at the instance of a co-parcener, Freeman, Co-tenancy & Partition (2nd ed.) § 420, carried with it a condition and an implied warranty: if one of the parties was thereafter evicted from her allotment she had an option either to re-enter for condition broken and thus avoid the whole partition, or to vouch by force of the warranty and claim contribution. Co. Lit., Parceners 174, a, b. This latter right depended on the privity of estate existing between the parties to the partition, so that if one of them aliened her allotment the privity was broken, and neither she nor her alienee was entitled to vouch by force of the warranty. Co. Lit., *supra;* see *Bustard's Case* (1603) 4 Coke 121. The Statutes 31 and 32 Henry VIII, which have been substantially re-enacted in all the United States, made partition compellable between tenants in common or joint tenants; this extension included the implied warranty but not the condition. *Sawyers* v. *Cator* (Tenn. 1847) 8 Humph. 256. In order that this warranty may be effective, it seems clear that all other parties to the partition should be estopped from asserting an after-acquired paramount title to other parcels of the partitioned land. *Venable* v. *Beauchamp* (Ky. 1835) 3 Dana *321; *contra, Richardson* v. *City of Cambridge* (Mass. 1861) 2 Allen 118; see *Walker* v. *Hall* (1864) 15 Oh. St. 355. Where, however, as in the principal case, one claims through the alienee of one of the partitioners, it follows that the estoppel should not work in his favor, as he is in no position to claim the benefit of the warranty. Furthermore, since the judgment in

a partition suit in no way adjudicates title unless it is specifically put in issue, Freeman, Co-tenancy & Partition (2nd ed.) § 529 *et seq.*, no further substantial reason can be found upon which to base an estoppel in such a situation.

SALES—STATUTE OF FRAUDS—CONTRACTS FOR WORK AND LABOR.—The plaintiffs contracted to furnish to the defendants a belt of a special pattern, to be manufactured by a third party. The defendants refused to accept the belt, and on suit by the plaintiffs set up the Statute of Frauds. *Held,* the plaintiffs could not recover. *Morse* v. *Canaswacta Knitting Co.* (App. Div. 1912) 130 N. Y. Supp. 634. See Notes, p. 524.

TAXATION—CORPORATIONS—"ENGAGED IN BUSINESS."—A railroad corporation by authority of the legislature leased all its property for 999 years, maintaining an office, however, and receiving rents and the interest from its bank deposits. *Held,* three justices dissenting, it was not engaged in business within the meaning of the Corporation Tax Law. *McCoach* v. *Minehill & Schuylkill Haven R. R.* (1913) 33 Sup. Ct. Rep. 419.

Realty companies engaged in leasing property and collecting rents, managing office buildings, etc., have been held liable for the tax, proportioned to net income, imposed by Act of August 5, 1909 § 38; 36 Stat. 112, on every corporation engaged in business, *Flint* v. *Stone Tracy Co.* (1911) 220 U. S. 107, 171, while a corporation which has disqualified itself from doing anything but holding title to a parcel of land and receiving and distributing rentals among its stockholders is not so liable. *Zonne* v. *Minneapolis Syndicate* (1911) 220 U. S. 187. Under the generally accepted legal definition of business as "that which occupies time, attention and labor for profit", *State* v. *Boston & Pickwick Clubs* (1893) 45 La. Ann. 585; *Netterville* v. *Barber* (1876) 52 Miss. 168; but see *Rolls* v. *Miller* (1884) L. R. 27 Ch. Div. 71, it is difficult to support the latter decision, but the principal case was correctly decided on its authority. The fact that the corporation in the principal case had not disqualified itself from engaging in further activities is no distinction, as the proper test is the activity of the corporation at the time the tax is sought to be imposed. See *Shryock & Rowland* v. *Latimer* (1882) 57 Tex. 674. Other authorities sustain the result reached, *State* v. *Anniston Rolling Mills* (1899) 125 Ala. 121; *cf. Wilson* v. *Peace* (1905) 38 Tex. Civ. App. 234; *Holmes* v. *Holmes* (1873) 40 Conn. 117, *Ralph* v. *Taylor* (1883) L. R. 25 Ch. Div. 194, and it is in accordance with the rule that when a statute providing for taxation is of doubtful construction the doubt should be resolved in favor of the tax payer. *United States* v. *Isham* (1873) 17 Wall. 496, 504; *American Net & Twine Co.* v. *Worthington* (1891) 141 U. S. 468. Moreover, as the only activity of the defendant in the principal case was the receiving of income from property, the result of allowing a tax, proportioned to the amount of income, to be imposed for the privilege of pursuing such activity would be in effect the imposition of a direct income tax without apportionment among the states. See Const., Art. 1, § 2; *Pollock* v. *Farmers' Loan & Trust Co.* (1895) 157 U. S. 429; 158 U. S. 601.

TAXATION—SPECIAL ASSESSMENTS—LIABILITY OF COUNTY PROPERTY.—A statute authorized towns to assess abutting property for the cost of highway construction, making such assessments a lien on the property. *Held,* a municipality had no authority to assess land owned by

the county and occupied by a county court house. *City of Mt. Sterling* v. *Montgomery County* (Ky. 1913) 153 S. W. 952.

The mere fact that a lien, which is the only remedy provided by the statute, cannot be enforced against county property, *County of McLean* v. *City of Bloomington* (1883) 106 Ill. 209; see *City of Clinton* v. *Henry County* (1893) 115 Mo. 557, is not decisive of the question whether the act, which makes no express reference to such property, was intended to authorize its assessment; for in the exceptional case of public property other, more appropriate methods might be employed. *County of McLean* v. *City of Bloomington, supra; Commissioners* v. *City of Ottawa* (1892) 49 Kan. 747. It may well be argued that the universal freedom of public property from general taxes, *County of Erie* v. *City of Erie* (1886) 113 Pa. 360; *Trustees* v. *City of Trenton* (1879) 30 N. J. Eq. 667, does not imply freedom from assessments, since tax-exempt private property is so liable. *Roosevelt Hospital* v. *Mayor* (1881) 84 N. Y. 108. The arguments, however, that grants and exemptions are to be strictly construed, and that such assessments only compel a fair payment for benefits conferred, do not apply to public property. The freedom of the state and its divisions from taxation rests not on any specific exemption, but upon the incongruity of compelling a sovereignty to pay taxes to itself, and a local assessment, resulting as it does from unrequested benefits, is a true tax and not a quasi-contract. 1 Page & Jones, Taxation by Assessment §§ 8, 18. Although it would accord better with justice to require the county to pay for the improvement of its property, it seems more consonant with legal principle to presume, in the absence of express words, that the legislature did not intend to disturb the freedom from taxation which the county enjoyed; and the principal case is supported by the weight of authority. *Worcester County* v. *Worcester* (1874) 116 Mass. 193; *County of Harris* v. *Boyd* (1888) 70 Tex. 237; *contra, Edwards & Walsh Constr. Co.* v. *Jasper County* (1902) 117 Ia. 365.

TRUSTS—FOLLOWING TRUST FUNDS.—A bank wrongfully sold certain stock pledged by the complainant, and deposited the proceeds with other money in a second bank. It sold drafts on this fund and subsequently dissipated the surplus for its own purposes. *Held,* the receiver took the assets subject to a trust for the whole amount of the proceeds of the sale. *Tillinghast* v. *Brennan* (1913) 201 Fed. 609.

The old theory in regard to following trust property was that the claimant's right to recover depended upon his ability to identify the specific subject-matter. See *Ober Co.* v. *Cochran* (1903) 118 Ga. 396. In some jurisdictions this rule has been relaxed so as to allow the estate of the trustee to be charged with the trust where it can be shown to have been benefited in a tangible way by the trustee's breach of duty. *Hopkins* v. *Burr* (1898) 24 Colo. 502; *Reeves* v. *Pierce* (1902) 64 Kan. 502. But the better rule seems to be that the trust *res* can be followed only when the claimant is able to trace and identify it in some particular fund or property. *Matter of Hicks* (1902) 170 N. Y. 195; *Hewitt* v. *Hayes* (1910) 205 Mass. 356. Such identification, when the *res* is money, is not in the specific currency, but in the fund, which can be traced into any mass with which it is merged. *Woodhouse* v. *Crandall* (1902) 197 Ill. 104; see *Lowe* v. *Jones* (1906) 192 Mass. 94. In the case of a trustee drawing from the mingled fund, the law will presume that he is no wrongdoer, and that the money first drawn out

is his own if used for his individual purposes. *Jopp* v. *Johnson's Trustee* (1904) 6 Sess. Cases (5th Series) 1028; *In re Hallett's Estate* (1879) L. R. 13 Ch. D. 696; see *Board of Commissioners* v. *Strawn* (1907) 157 Fed. 49. When, however, the rest of the mingled fund is wholly dissipated, the presumption that the trustee has observed his duty will attach the trust to any property that can be traced as the product of any part of the fund. *In re Oatway,* L. R. [1903] 2 Ch. 356. It would follow, therefore, that the amount which the bank received from the sale of the drafts could be recovered as a trust fund. But no such recovery can be allowed for the surplus remaining from the conversion of the stock except upon the undesirable ground that it went to swell the assets of the bank.

WATERS AND WATER COURSES—TITLE TO BEDS OF NAVIGABLE RIVERS—INTERNATIONAL BOUNDARIES.—The plaintiff, owning an island in the Niagara River, a boundary between the United States and Canada, sought to restrain the defendant from removing sand from the river bed. *Held,* the State of New York and not the plaintiff was the owner in fee of the bed of the river. *Strawberry Island Co.* v. *Cowles et al.* (Sup. Ct. 1912) 140 N. Y. Supp. 333. See Notes, p. 531.

WILLS—CONTESTS—SURVIVAL OF RIGHT.—The heir at law and a nephew of a putative testator commenced an action to contest the will; pending suit the heir died, leaving the nephew as her heir. *Held,* the action survived to her heir and her executor. *Ingersoll* v. *Gourley* (Wash. 1913) 130 Pac. 743.

The statutes usually provide that a will may be contested by any person interested. It is widely held that a general creditor of an heir or distributee is not interested in the probate, but an attaching creditor, who will himself get title to the inherited property if the will is set aside, has sufficient interest. *Smith* v. *Bradstreet* (Mass. 1834) 16 Pick. 264; *Watson* v. *Alderson* (1898) 146 Mo. 333; see *Brooks* v. *Paines Exr.* (1906) 123 Ky. 271; *contra, Shepard's Estate* (1895) 170 Pa. 323. Some courts have extended this rule to an attachment secured after the probate. *Bloor* v. *Platt* (1908) 78 Oh. St. 46. The same reasoning would include the case of the heir or executor of an heir or distributee, whose title likewise depends upon the validity or invalidity of the will. See *Rainey* v. *Ridgway* (1906) 148 Ala. 524; *cf. Diffenderffer* v. *Griffith* (1881) 57 Md. 81. A minority view denies the claim of the attaching creditor, *Lockard* v. *Stephenson* (1898) 120 Ala. 641; *Banks* v. *Nelson* (Tenn. 1859) 3 Head 634, holding that the right to contest a will is a naked personal right to have an instrument set aside, and therefore not assignable. *Storrs* v. *St. Luke's Hospital* (1899) 180 Ill. 368; *cf. Norton* v. *Tuttle* (1871) 60 Ill. 130; *Prosser* v. *Edmonds* (1835) 1 Younge & Coll. 481. According to this view it is equally incapable of passing by descent. *McDonald* v. *White* (1889) 130 Ill. 493. The former appears to be the better view, however, since the plaintiff claims not as assignee of a chose in action, but as a person interested, within the statute.

WILLS—GENERAL AND SPECIFIC LEGACIES—BEQUESTS OF STOCK.—Two sisters by joint will bequeathed their property to one another with full power of disposal, and after the death of the survivor "40 shares of stock of the L. Co. to A, 40 to B, and 40 to C". At the time of the will the sisters together owned just 120 shares. *Held,* the legacies

were general, and therefore not subject to ademption. *Mecum* v. *Stoughton* (N. J. Eq. 1913) 86 Atl. 52.

Whether a legacy shall be deemed general or specific depends, of course, upon the supposed intention of the testator. *Jewell* v. *Appolonio* (1909) 75 N. H. 317; *Kunkel* v. *Macgill* (1880) 56 Md. 120. Thus if a bequest of stock is couched in language indicating that the testator had particular shares in mind, as if he refers to it as "my stock", it will be construed as specific. *Johnson* v. *Goss* (1880) 128 Mass. 433; *Gardner* v. *McNeal* (1911) 117 Md. 27. But in doubtful cases the leaning of the courts is to construe a legacy as general, *Kenaday* v. *Sinnott* (1900) 179 U. S. 606; *Kunkel* v. *Macgill, supra,* in order to prevent the operation of the rather harsh doctrine of ademption, which makes disposition by the testator of any part of the property specifically bequeathed, a diminution *pro tanto* of the legacy. Page, Wills, § 780. In view of this tendency it seems that the mere fact that the testators in the principal case together possessed the exact amount of stock bequeathed should not affect the construction of the bequests, which were, in form, general. *Tifft* v. *Porter* (1853) 8 N. Y. 516; *Snyder's Estate* (1907) 217 Pa. 71. The cases reaching the contrary result, see *Drake* v. *True* (1903) 72 N. H. 322; *White* v. *Winchester* (Mass. 1827) 6 Pick. 48, must be considered opposed to the weight of authority.